United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1138

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P/S

To be argued by
STANLEY H. FISCHER

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

LOUIS WOLFISH,
Defendant-Appellant.

BRIEF FOR APPELLANT

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AMENDMENT [IV.]

Searches and seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses ag-inst him; to have compulsory

II. THE "SOUTHERN DISTRICT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES"

"4. All Cases: Trial Readiness and Effect of Non-Compliance.
In all cases the government must be ready for trial within six (6) months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move, in writing, on at least ten (10) days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect was excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten (10) days."

CASES CITED

Berger v. United States,
295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935)

Birdsell v. United States,
346 Fed. 2d 775 (5th Cir. 1965)

U.S. ex rel v. Bisordi v. La Vallee,
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United States v. Curtis,
330 Fed. 2d 278 (2nd Cir., 1964)

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United States v. Rollins,
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330 Fed. 2d 271 (2nd Cir. 1964)

United States v. Swan,
396 Fed. 2d 883 (2nd Cir. 1968)

United States v. Toscanino,
500 Fed. 2d 267 (2nd Cir. 1974)

United States v. Wade,
388 U.S. 218, 87 S.Ct. 1926 18 L.Ed. 2d 1149 (1967)

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ISSUES PRESENTED

1. Should the judgment of conviction be reversed on the grounds that the jury was instructed that only "unreasonable" inferences may not be drawn from Appellant's failure to testify?

2. Should the judgment of conviction be reversed on the grounds that the prosecutor's summation was inflammatory?

3. Should the judgment of conviction be reversed and the indictment dismissed because the Government was not ready to proceed within six (6) months, pursuant to the Southern District rules regarding prompt disposition of criminal cases?

4 A. Should the judgment of conviction be reversed because the prosecutor used Court ordered exemplars as testimonial acknowledgment of Appellant's guilt, in violation of the Fifth Amendment.

B. Should the judgment of conviction be reversed because the Court permitted the testimony of a handwriting expert whose conclusion was based on non-authenticated samples?

5 A. Should the judgment of conviction be reversed because the Appellant was deprived of his right to confrontation and cross examination by the admission into evidence of the Grand Jury testimony of a witness who neither admitted the truth of it, nor that he gave it, and who claimed his Fifth Amendment privilege?

B. Should the judgment of conviction be reversed because the Court failed to admonish the jury that they "must not use the refusal to answer by a witness as evidence of what the answer would have been"?

6. Should the judgment of conviction be reversed because of an in-Court identification based on a suggested out-of-Court identification?

7. Should the judgment of conviction be reversed because the Court refused to direct the Government to turn over reports concerning a typewriter in Horowitz' possession?

8 A. Should the judgment of conviction be reversed because Appellant was denied his right to retain counsel of his own choosing?

B. Should the judgment of conviction be reversed because the Appellant, an attorney in this Court, was refused the right to appear as co-counsel?

9 A. Should the Court examine Court Exhibit 4?

B. Should the judgment of conviction be reversed because of a search in Israel in which the Israeli Police were acting at the instigation of the American authorities?

10. Should the judgment of conviction be reversed and the matter remanded to complete the suppression hearing?

11. Should the conviction be reversed because the Government failed to prove that the defendant himself used and with knowledge caused others to use the mails?

STATEMENT OF THE CASE

The defendant, LOUIS R. WOLFISH, an attorney and rabbi, was indicted on November 15, 1973 on three (3) counts of mail fraud.

The offenses charged that the defendant falsely and fraudulently submitted a false death certificate on his life through Bankers Life to obtain the proceeds of policies on his life, and used the mails to execute this scheme (6a).

Trial of the defendant was had before the Hon. Lawrence W. Pierce by jury from January 6, 1975 to January 17, 1975.

In support of the charges, the Government introduced evidence showing that communications were had by letter with one "Marcia Wolfish" (62a, 66a, 72a, 87a, 89a) but that the signatures of some of the Marcia Wolfish documents were tracings (167a, 205a, 209a-211a). Upon receipt of the documents, Bankers Life forwarded some $180,484.32 (75a, 89a) which was deposited in the Dime Savings Bank (101a-103a)

After an agent of Bankers sought to deliver an additional $20,000.00 to Marcia Wolfish (93a, 94a) an investigation commenced to determine the validity of the death certificate (100a).

The death certificate proved false (160a, 161a). At the instigation of American authorities (49a, 51a,) some two (2) weeks after questioning of defendant in Israel by American officials (52a-54a) the Israeli Police raided an apartment

in Jerusalem (58a). The search was in violation of Israeli law (389a). Mrs. Wolfish, but not the defendant, was present at the premises (175a) when eighty-four (84) documents, including two (2) packets of seals were seized (199a). The documents included death certificates (177a, 181a), and photostats of death certificates (183a). Emanuel Mack, an Israeli lawyer, testified that he had translated nine (9) copies of death certificates for Marcia Wolfish (122a).

All monies were recovered.

There were only three (3) connections which linked the defendant to the charges and all three (3) were clouded.

A clerk at the Israeli Consulate pointed out the defendant as the person she "thought" brought a death certificate to certify (222-3a, 224a) some four (4) years earlier. It was conceded that she had seen impermissibly suggestive pictures (215a-216a) and that her thought processes may have been affected hereby (254a-255a).

More than six (6) months after defendant's arrest, the Government sought handwriting exemplars of the defendant, which were Court ordered. The English handwriting expert testified that he could not state who signed documents and that tracings were frequently used (205a, 206a, 214a, 161a). The Hebrew handwriting expert testified that defendant "disguised" his handwriting in giving exemplars (267a). She testified that she compared two (2) letters written to Marcia Wolfish (Ex 45A+B) of which she didn't know the author (274a, 280a), with a forged death certificate (277a) and that

the same person did both (279a, 280a). The Jury asked for exhibits 45A&B. The Grand Jury testimony of Israel Horowitz, a rabbi and brother-in-law of the defendant, was admitted into evidence, although he did not acknowledge it, and took the Fifth Amendment, in part, at trial, thereby depriving defendant of confrontation. The Grand Jury testimony stated that defendant received his mail personally. The Jury asked for this Grand Jury Testimony.

Defendant's motions for judgment of acquittal were denied. Defendant was found guilty on all counts. He was sentenced to concurrent terms of three and one-half (3-1/2) years with eligibility under 18 U.S.C. 4208a (1) after one year.

The defendant appeals from the judgment on all counts on the grounds hereinafter argued.

POINT I

THE INSTRUCTION TO THE JURY THAT ONLY "UNREASONABLE" INFERENCES MAY NOT BE DRAWN FROM APPELLANT'S FAILURE TO TESTIFY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AS SECURED BY THE FIFTH AMENDMENT.

Appellant requested the Court that "no comment whatsoever should be made concerning defendant's failure to testify", in writing, and then orally asked the Court to comment "no unfavorable inferences"(286a, 317a). Nevertheless, the Court instructed the jury concerning Appellant's failure to testify, as follows:

> "You may draw no unreasonable inferences against the defendant because he did not take the stand and testify. In addition, you may not speculate as to why the defendant chooses not to testify, nor may you speculate as to what the defendant might have stated had he chosen to testify. In every criminal case, there is a constitutional rule which every defendant has the right to rely upon. It is the rule that no defendant is compelled to take the witness stand. It is the prosecution which must prove a defendant guilty as charged beyond a reasonable doubt." (336a)

The instruction that "no unreasonable inferences" might be drawn from Appellant's failure to testify clearly implies that nevertheless, unfavorable "reasonable" inferences might. The charge was an invitation for the jury to draw an unfavorable "reasonable" inference. The Government's case was principally based on a

series of documents with the Appellant's name mentioned thereon or allegedly signed thereto. The defense was, in part, that other parties had put the name on the documents. The Government's English handwriting expert admitted that signatures were, in many cases, "tracings". The Appellant was not present when documents were seized and any connection by Appellant with the documents were minimal, if at all existing. The jury may well have considered the inferences which could logically be drawn from Appellant's failure to testify - including the obvious proposition that he could not deny his signature - a decisive element.

The only identification of Appellant was made by Eva Bahrev, which was undoubtedly based on a suggestive photographic spread (dealt with elsewhere). The jury could well have inferred that the Appellant was indeed present at the Israeli Consulate before Ms. Bahrev from his failure to testify - another reasonable inference.

Rabbi Horowitz, a Government witness, exercised his privilege under the Fifth Amendment. The Government then read Rabbi Horowitz's alleged, but not admitted, Grand Jury testimony to the jury - the jury could have inferred that, had he answered, his answers would have been unfavorable to his brother-in-law, the Appellant.

The aforementioned are but three (3) logical, reasonable, but unfavorable inferences that could have been drawn by

the jury pursuant to the charge.

Indeed, a very similar charge was given to the jury in Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which the Court ruled was an improper comment on the failure of a defendant to testify, in violation of the Fifth Amendment:

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify. . . the jury may take that failure into consideration." . . . at 610.

In Fontaine v. California, 390 U. S. 593, 88 S. Ct. 1229, 20 L. Ed. 2d 154 (1968), the trial judge had instructed the jury that it could draw adverse inferences from petitioner's silence. The Supreme Court held that this comment violated the defendant's constitutional privilege against self-incrimination.

In the instant case, by permitting reasonable inferences, the Court permitted adverse inferences. See also Government of Virgin Islands v. Bell, 392 Fed. 2d 207 (3rd Cir. 1968) 18 U.S.C. Section 3481.

By instructing the jury that it may not draw any "unreasonable" inference from Appellant's failure to testify, the jury was given free reign to draw a reasonable inference from that failure, which is just as constitutionally prohibited, since that inference may be an unfavorable one, such as the

truth of evidence which Appellant may "reasonably" be expected to deny or explain. The Fifth Amendment violation requires that the judgment of conviction be reversed and a new trial be granted.

POINT II

THE INFLAMMATORY REFERENCE TO APPELLANT'S RELIGIOUS ETHICS AS A RABBI, DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Appellant is an ordained rabbi. Assistant United States Attorney Schatten used Appellant's religious standing to make an inflammatory attach upon Appellant, in his summation:

> "A man named Moses on a Mount named Sinai brought forth Ten Commandments, and one of those commandments proclaimed 'Honor Thy Father and Mother'. Bring Government's Exhibit 30, the forged death certificate that has been tampered with, the forged death certificate being converted from the death certificate of Mrs. Revecca Wolfish into the death certificate of Louis Wolfish - bring that Exhibit with you into the jury deliberation room and you will see the attitude toward those Ten Commandments exhibited by this Rabbi Wolfish.
> Mr. Rosen: Your Honor, I didn't want to interrupt Mr. Schatten, but I think I did signal Your Honor I didn't want to waive anything as he was going on. I think the Government has now finally risen to a new low in citing to the jury in summation the Ten Commandments and the express charge in pointing at the defendant and accusing him of defiling the memory of his mother and violating one of the Ten Commandments. . . . .
> I think the prejudice is clear and I am constrained at this time to most respectfully move for a withdrawal of a juror and the declaration of a mistrial.
> The Court: The application is denied . . . ." (324a-327a)

What a prosecutor may not do is to appeal to the passions of a

jury. It is difficult to conceive a more inflammatory emotional appeal than the one formulated by Mr. Schatten. To attack a defendant because of his religious calling is so prejudicial, that no conviction obtained can be considered untainted, where such conduct is indulged in.

In United States v. Curtis, 330 F. 2d 278 (2nd Cir., 1964), the defendant was held to have been denied a fair trial by a summation by a prosecutor which included:

> "I say that this man stands before you and he begs for your sympathy; he is strictly a faker, he is trying to pull the wool over your eyes, and you are not going to let him get away with it."

The summation in Curtis was mild in comparison to the emotional appeal of the lyricism of Mr. Schatten.

In United States v. Gonzalez, 488 Fed. 2d 833 (2nd Cir. 1973), the prosecution characterized the defendant as "repeated junk dealer", characterized defendant's defense as "a pack of lies" and "an insult to your intelligence". This Court recognized the prejudice which the summation likely aroused and that the statements raised grave doubts about the fairness of the proceedings and reversed and remanded for a new trial.

In the recent case of United States v. De Loach, 504 Fed. 2d 185 (D. C. 1974), the prosecutor stated that the victim had been "shot down like a dog in the street" and used the words

"executions" and "assassinations". These phrases were condemned by the Court in its reversal as inconsistent with the "dignity of the Government" and an unnecessary appeal to "passion and prejudice".

While the prosecutor is at liberty to strike hard blows, he is not at liberty to strike foul ones. Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). It is difficult to conceive a more "foul" blow than found in the summation of the prosecution. The judgment of conviction should be reversed.

POINT III

THE NOTICE OF READINESS FILED BY THE PROSECUTION WAS FALSE AND VIOLATED THE "SOUTHERN DISTRICT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES".

The "Southern District Rules Regarding Prompt Disposition of Criminal Cases" provides:

> "4. All Cases: Trial Readiness and Effect of Non-Compliance.
> In all cases the government must be ready for trial within six (6) months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move, in writing, on at least ten (10) days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect was excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten (10) days."

The Government's six-month period of time to get ready

commenced to run on the 14th day of Februar , 1974, when Appellant surrendered and was arrested. That was the date of his "arrest" and "detention", as specified in Rule 4. The Government's time to get ready terminated on the 14th day of August, 1974, six (6) months from the aforementioned date. On May 3, 1974, Judge Bauman fixed a trial date of July 22, 1974.(2a)

On the 8th day of July, 1974, the Government filed a notice of readiness that it was prepared to go to trial on the 22nd day of July, 1974. On July 1st, the Court announced that it would seek reassignment of the case.(2a)

The notice of readiness proved false. The Government was not ready to go to trial on the day it designated. On the 21st day of August, 1974, which was beyond the six-months expiration date, the Government made a motion for handwriting exemplars to be furnished by Appellant, both in English and in Hebrew, which was on that day granted by Judge Pierce. The exemplars were a key item in the prosecution.(3a)

On the 3rd day of October, 1974, without the presence of counsel, Appellant was compelled to give exemplars of his handwriting.

The application of the Assistant United States Attorney, in seeking additional evidence, stamps the notice of readiness filed by the Government as false and a sham. Under Rule 5 of the "Southern District Rules", there were no grounds for a continuance

Obviously, the prosecutor had not exercised "due diligence to obtain" evidence of the handwriting exemplars, since a motion could have been made to compel them within the six month period required by the rules. Nor were there "exceptional circumstances" to justify extension of the time period, for the very reason that the motion to obtain the exemplars could have been made within six (6) months.

Appellant, both pro se and by counsel (397a, 67a) moved to strike the notice of readiness and dismiss the indictment. The Court refused to consider Appellant's pro se motion and denied counsel's motion (401a, 69a).

In United States v. Rollins, 475 Fed. 2d 1108 (2nd Cir. 1973), it was held that the Government need not move within the six (6) month period for an extension of its limitation to get ready for trial, but it had to make a showing that any delay in getting ready within the period of limitation was due to "exceptional circumstances". United States v. Rollins, 487 Fed. 2d 409 (2nd Cir., 1973) reached the Court of Appeals for a second time, at which time it was held that the Government was excused for its delay in getting ready, when it appeared that the officer who had made the undercover narcotics sale in issue, himself was under a cloud of suspicion, as a result of charges leveled against him. The officer, until cleared, faced a devastating credibility attack which justified prosecutorial delay until the charges against him

were resolved. The situation in Rollins must be contrasted with the one at bar, where there was no excuse for the Government not to get ready within the six (6) month limitation, when at all times, Appellant was available to respond to a Court order to give the exemplars. The simple truth is that the United States Attorney failed to exercise "due diligence".

In United States v. Furey, 500 Fed. 2d 338, the Government failed to file its notice of readiness apparently due to "administrative confusion" and "clerical omission". This Court failed to find any "exceptional circumstances", vacated the judgment and remanded for purposes of making findings of fact on the issue of excusable neglect.

Unquestionably, in the instant case, the prosecutor was not ready for trial when he filed his notice, and his delay was due to prosecutorial neglect, which is precisely what this Court and the Southern District have sought to prevent and prohibit by establishing the Speedy Disposition Rules.

If the Government prosecutor is not faced with complete and absolute discharge of the defendant upon failure to diligently prosecute, he will be less likely to live up to the spirit and letter of the Plan. See ABA, Project on Minimal Standards for Criminal Justice, Standards Relating to Speedy Trial, Approved draft 1968, pages 40-41. See also the New Speedy Trial Act of 1974 (effective 1975) which clearly states that no continuance

shall be granted because of lack of diligent preparation by the Government (18 USC Section 3161, Sub. 8C). Also, United States v. Flores, 501 Fed. 2d 1356 (2nd Cir. 1974), United States v. McDonough, (2nd Cir. 1974).

Since the prosecution was, in fact, not ready for trial when it filed its false notice of readiness and was not ready within six (6) months, as required by the rules, the judgment should be reversed and the indictment dismissed with prejudice.

POINT IV

A. THE USE OF THE COURT-ORDERED EXEMPLARS BY THE PROSECUTION AS A "DISGUISE OF APPELLANT'S HANDWRITING" CHANGED THE STATUS OF THE EXEMPLARS TO A TESTIMONIAL ACKNOWLEDGMENT OF GUILT, IN VIOLATION OF THE FIFTH AMENDMENT.

Both the testimony of the Government witness, Varda Tamir, and the summation of the prosecutor, contained the accusation that Appellant had sought to disguise his handwriting in executing Court-ordered exemplars. This was not the situation of merely distinguishing between the exemplars and exhibits in evidence. Instead, the prosecution elicited from the witness:

> "Q. And you didn't use these exemplars in this chart? Is that your testimony?
> A. Yes, because the handwriting is disguised.
>
> Q. This handwriting is disguised?
> A. That's right. (263a)

and

> A. When on October 3rd I dictated to Mr. Wolfish the contents of Exhibit 30, he wrote in a manner which showed me that is disguising his handwriting." (267a).

The Court then ruled that it would not allow the characterization that the handwriting was disguised. (271a, 273a)

Nonetheless, the prosecutor, in his summation, reiterated the characterization when he stated:

"Ladies and gentlemen, I think it is as clear that Mr. Wolfish, . . . had disguised his handwriting. (325a, 326a)

and

Ladies and gentlemen, I submit to you isn't Mr. Wolfish's disguising of his own handwriting another clear item of evidence which indicates a clear unmistakable evidence of guilt in this scheme to defraud? (326a)

and

Her testimony was that not only did she testify to the fantastic forms and the attempted disguise that the defendant, Mr. Wolfish, used in October of 1974." (329a)

This intentional capitalization, by the prosecution, upon an implied admission of guilt by Appellant arising from the alleged attempt to disguise his handwriting in executing exemplars is a violation of the Fifth Amendment. The issue is not handwriting as being within the ambit of the privilege against self-incrimination, but the prosecutor's intentional claim of an alleged acknowledgment of guilt from the "disguised" handwriting. This is precisely the question left open by United States v. Izzi, 427 Fed. 2d 293 (2nd Cir. 1970):

"We are therefore not required to confront the problems, difficult both conceptually and practically, which would be presented had Izzi made out his claim that the Government had intentionally sought to capitalize on an implied admission arising from an alleged attempt to

disguise his handwriting in executing exemplars under coercion of a Court order." Note 1, page 295. *

Handwriting may not be testimonial but, undoubtedly, a claim of guilt arising from disguised handwriting is. Appellant's Fifth Amendment privilege against self-incrimination was violated. The conviction should be reversed.

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* The defendant insisted on the presence of counsel during the taking of exemplars, which right was denied him. None of the written pre-trial reports & findings of Varda Tamir stated that Defendant disguised his handwriting at the giving of exemplars. Defendant was not forewarned prior to trial that admission of guilt testimony was to be used against him. No hearing was held and the evidence came as a complete surprise at trial.

B.

THE COURT ERRED IN PERMITTING THE TESTIMONY OF THE HEBREW HANDWRITING EXPERT SINCE THE CONCLUSION WAS BASED ON NON-AUTHENTICATED SAMPLES.

Varda Tamir testified on behalf of the Government as a Hebrew handwriting expert. She testified that she received Exhibits 45-A and B, which were letters written to Marcia Wolfish. She stated (305a) (274a) (275a) and the Government conceded that it was not known who wrote 45-A and B (303a) (303a) and compared them with forged death certificates Exhibits 30 and 31. She further testified that the Hebrew exemplars were disguised. Based on her comparison of 45-A and B with 30 and 31, she concluded that 30 and 31 were written by the Appellant. Since no documents authenticated to be Appellant's were used and the exemplars were alleged to be disguised, her testimony should have been stricken and Appellant's counsel so moved (263a, 264a) (305a(1)41)) which motion was denied.

In the similar case of United States v. Wagner, 475 Fed. 2d 121 (10th Cir. 1973), the expert relied on admitted exemplars and public records to form his opinion. The Court stated at 123:

> ". . .the handwriting expert's opinion is based, in part, upon a comparison of signatures not proved to be genuine or admitted into evidence as such. The trial Court's ruling, admitting Wagner's "purported" signature as a standard of comparison

> clearly indicates that the Court misconceived the established rule governing authentication in cases of this kind. Not having been proved to be genuine, the signatures on the public documents were inadmissible as standards of comparison. In these circumstances, the foundation for the expert's opinion cannot stand and his opinion falls with it. The opinion evidence was erroneously admitted, it was prejudicial and the case must, accordingly be reversed for a new trial."

In United States v. Swan, 396 Fed. 2d 883 (2nd Cir.1968) the Government proved the genuineness of the exemplars (Columbia University Records) to the satisfaction of the Court. In the instant case, the Government conceded that it was not known who wrote 45-A and B (302a, 303a) The jury asked for 45A and B.

As the Court said in Wagner at 123:

> "To be admissible and usable as a standard of comparison, for the purposes of opinion evidence in a questioned writing, the specimen must first be authenticated. Authentication means proof of authorship, and whether a writing has been properly authenticated is a matter for the Court to decide based upon proof to its satisfaction."

In the instant case, the standard of comparison was Exhibits 45-A and B, which were admittedly not authenticated. The opinion evidence was erroneously admitted, was prejudicial and a reversal is mandated.

POINT V

A.

APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO CONFRONTATION AND CROSS EXAMINATION BY THE ADMISSION INTO EVIDENCE OF THE GRAND JURY TESTIMONY OF A WITNESS, WHO NEITHER ADMITTED THE TRUTH OF IT, NOR THAT HE GAVE IT AND WHO CLAIMED HIS FIFTH AMENDMENT PRIVILEGE.

The Government called as a witness Israel Horowitz, brother-in-law of the Appellant. After testifying on direct that persons other than Appellant picked up Appellant's mail, thus raising a reasonable doubt whether Appellant had ever personally received the checks mailed by Banker's Life (125a-127a) he asserted on cross, on advice of the Court, his Fifth Amendment privilege when asked whether it was he who had signed Appellant's name to a registered mail receipt. (133a-134a)

On redirect examination, the Assistant United States Attorney used Horowitz's Grand Jury testimony to cross examine him, even though Horowitz did not admit the truth of that testimony and insisted that he did not remember even giving it (141a-156a). It developed that before the Grand Jury, the witness had given deadly incriminating evidence against Appellant, having then testified that Appellant received all of his mail personally, in broad contrast to his trial testimony, supporting an inference that he had received

the checks that were the subject of the alleged swindle (143a-149a). The Assistant United States Attorney, after reading this devastating Grand Jury testimony to the jury, offered the Grand Jury testimony in evidence, citing United States v. De Sisto, 329 Fed. 2d 929 (158a) and United States v. Klein, 488 Fed. 2d 481. Appellant objected before the testimony was actually received to its admission. The motion to receive was granted (164a)

Concerning the Grand Jury testimony, the Court charged the jury as follows:

> "I have admitted into evidence during the course of the trial, Government Exhibit 43-C,, the testimony that was given under oath before a Grand Jury by Israel Horowitz. You may consider such evidence before the Grand Jury as evidence of the truth of the matters about which Mr. Horowitz testified and give it whatever weight and consideration you think it should be accorded" (345a, 346a).

United States v. De Sisto, supra and United States v. Klein, supra, were inapplicable in the instant case, since the question in those cases was whether the prior testimony was admissable as an exception to the Hearsay rule. See also United States v. Rivera, Docket # 74-2115, decided 3/13/75. In the instant case, the issue is whether the witness' assertion of the Fifth Amendment privilege, concerning certain questions before the Grand Jury, and the introduction into evidence of the non-admitted Grand Jury testimony, denied Appellant his right to confront his accuser under

the Sixth Amendment. The jury asked for these Grand Jury Minutes.

In Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965), the Court was faced with a similar fact pattern. The accomplice of the defendant was called as a witness by the prosecution. He took the Fifth Amendment to every question asked of him. He was cross examined with his confession and he continued to take the Fifth Amendment when he was asked to affirm or deny the truth of its contents. The confession was received in evidence against the defendant. As a result, the conviction was reversed on grounds that the admission into evidence of the confession deprived the defendant of his Sixth Amendment right to confrontation and cross examination. The Court stated at 242-243:

> "The primary object of the constitutional provision in question was to prevent depositions or ex party affidavits. . .being used against the prisoner in lieu of a personal examination and cross examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief."

The Court, in the Douglas case, recognized the principle that "effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but

relied on his privilege to refuse to answer." The parallel to the case at bar is so clear it requires no comment.

Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed 2d 923 (1965) was decided the same day. There, the testimony of the witness, no longer within the jurisdiction of the Court, taken at a preliminary hearing, was read into evidence. Because the defendant did not have counsel at the hearing to cross examine the witness, the admission of the testimony was ruled violative of the Sixth Amendment. In the case at bar, though Horowitz was present for the trial, his taking of the Fifth Amendment and refusal to affirm or disaffirm the truth of his Grand Jury testimony, made cross examination impossible.

Horowitz's statements concerning the delivery of the mail constituted the only direct evidence that Appellant had received the checks; this formed a crucial link in the proof, both of Appellant's act and of the requisite intent to defraud. The prosecutor's reading of the Grand Jury statement may well have been the equivalent, in the jury's mind, of testimony that Horowitz made the statement; and Horowitz's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. This was further compounded by the judge's charge. Since the prosecutor was not a witness, the inference from his reading of the Grand Jury minutes that Horowitz made the statement could not be

tested by cross examination. Similarly, Horowitz could not be cross examined on a statement imputed to but not admitted by him. The inference from this witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross examination and thus unfavorably prejudiced the defendant. See Douglas v. Alabama, supra.

As the Court said in Pointer v. Texas, supra, at 407:

> "Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner, through counsel, an adequate opportunity to cross examine Phillips, its introduction in a Federal Court in a criminal case against Pointer would have amounted to denial of the privilege of confrontation guaranteed by the Sixth Amendment."

B.

THE COURT'S FAILURE TO ADMONISH THE JURY THAT THEY "MUST NOT USE THE REFUSAL TO ANSWER BY A WITNESS AS EVIDENCE OF WHAT THE ANSWER WOULD HAVE BEEN" WAS ERROR.

The Trial Court failed to provide the cautionary admonition that the jury must not use Horowitz's refusal to answer and assertion of Fifth Amendment privilege as evidence of what the evidence would have been. This admonition was mandated by this Court in United States v. Maloney, 262 Fed. 2d 535 (2d Cir. 1959) in a similar situation. See also Weinbaum v. United States, 184 Fed. 2d

330 (9th Cir.), United States v. Amadio, 215 Fed. 2d 605 (7th Cir.).

As this Court said in reversing the conviction in Maloney, supra, at 538:

> "There was no such admonition in the case at bar, and, although the accused did not ask for one, it appears to Judge Waterman and me that their failure to do so falls rather within Criminal Rule 52B than within Rule 30, 18 USCA. U. S. v. O'Connor (2nd Cir.) 237 Fed. 2d 466.
>
> and
>
> We rest our decision, therefore, upon the fact that the accredited ritual was not followed."

The judgment should be reversed.

POINT VI

SUGGESTIVE IDENTIFICATION PROCEDURES THAT EFFECTED THE IN-COURT IDENTIFICATION OF APPELLANT AND AN INADEQUATE CHARGE TO THE JURY ON THE SUBJECT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR CONFRONTATION AS SECURED BY THE SIXTH AMENDMENT.

The only identification or near identification of Appellant in the instant case as a participant in the acts alleged was made by Eva Bahrev, an administrative assistant in charge of the notarization desk of the Israeli Consulate General in New York City (221a, 222a). It was a "hazy" identification of Appellant as the person who brought her the forged death certificates to certify the translation. As she stated in Court, "I think this gentleman was the one", pointing to Appellant (223a).

Ms. Bahrev had been shown ten (10) pictures, depicting six (6) or seven (7) different persons. However, Appellant's was the only picture with a beard. The Court barred the prosecution from using the out-of-court identification and ruled that the pictures were overly suggestive (220a) but did not suppress the in-court identification, even though Ms. Bahrev conceded that her out-of-court identification might have tainted her in-court identification.

> "Q. In your own mind, when you selected the picture, were you assisted because of the dissimilarity in the photograph?
> A. Well, it is very hard to say how the

human mind works, but it might have been. I don't know." (254a-255a)

"The admission of the in-court identifications, without first determining that they were not tainted by the illegal line-up but were of independent origin was constitutional error." Gilbert v. California, 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967).

"Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

It was not only error for the Court to admit the in-court identification, without first determining that it was untainted by the suggestive pre-trial identification procedures, but error to allow the in-court identification at all, in view of the uncertain identification made by the witness, coupled with the grossly suggestive procedures of showing her a group of pictures, the only one bearded being Appellant's.

The "totality of circumstances" in the conduct of the identification procedure was, in the instant case, "so unreasonably suggestive and conducive to irreparable mistaken

identification as to be a denial of law." Foster v. California, 394 U. S. 440. And to allow the witness to make an in-court identification violated due process. United States v. Casscles, 489 Fed. 2d 20 (2nd Ci. 1973), U. S. ex rel Bisordi v. La Vallee, 461 Fed. 2d 1020 (2nd Ci. 1972), U. S. ex rel Phipps v. Follette, 428 Fed. 2d 912 (2nd Ci.) Cert. denied 400 U. S. 908, 91 S. Ct. 151, 27 L. Ed. 2d 146 (1970).

The factors to be considered in evaluating the likelihood of misidentification were stated in Neil v. Biggers, 409 U.S. 188 and include:

A. "The level of certainty demonstrated by the witness at the confrontation -- Ms. Bahrev is absolutely uncertain.

> "Q. Do you see the individual in court today who brought in Government's Exhibit 28A and 28B to the Israeli Consulate?
> A. I think so. (222a)
>
> and
>
> Q. Would you answer the question, please?
> A. I think that the gentleman in the corner. (222a)
>
> and
>
> A. Yesterday, I said I think this was the man. I didn't say this was the man. I think this was the man." (248a)

B. "The length of time between the crime and

the confrontation" -- The acts involving Ms. Bahrev occurred in January, 1971. She was not contacted by postal authorities until one and one-half (1-1/2) years before trial, in July, 1973, some two and one-half (2-1/2) years after the January, 1971 incident. The trial was some four (4) years after the January, 1971 incident.*

C. "The opportunity of the witness to view the criminal at the time of the crime" -- Ms. Bahrev was not a witness to a crime before her such as would heighten her observation and retention senses and create a lasting impression (Example. See a bank robbery, a shooting, etc.) Instead, a person came before her in her clerical capacity for notarization. She testified that she could not describe anyone she saw on January 5, 1971 (234a), some four (4) years prior to trial, nor describe conversation with anyone (234a). Her role was

> "Well, a person came in with a Xerox of a death certificate and a translation of it, and asked me to have it certified, which I did. It is something that we are used to do." (224a)

---

* In the Neil v. Biggers case, supra, the court felt that a lapse of seven (7) months between the occurrence and the confrontation was a seriously negative factor.

She didn't know the length of time (232a) nor could she remember one of the occasions (226a, 232a).

D. "Witness degree of attention" -- the witness could not be sure that she even saw a person on January 12, 1971. (226a)

E. "The accuracy of the witness' prior description of the criminal" -- the witness recalled "fat, black hair, thick features and yarmulka". However, she made no mention of a beard (233a); couldn't remember a beard, although she remembers someone asked her about a beard (239a, 240a, 241a). Nonetheless, after "someone asks her", she selects the bearded man in the photographic spread.

F. Other factors: The Appellant had a temporary visa stamped on his passport in October, 1971 by Ms. Bahrev. She testified that she had no recollection of the incident, even though it was some nine (9) months after her supposed observation of the Appellant.

To compound this error, despite a request to charge (382a) covering the subject matter in depth, the charge to the jury by the Court concerning identification was grossly inadequate:

> "In assessing the weight to be given to that evidence, you may consider all the circumstances revealed by the evidence concerning the witness'

> observations, as well as all the circumstances revealed by the evidence concerning the witness' in-court identification. You may also consider that errors in photographic identification can occur and that these errors may affect a subsequent court identification" (343a)

The failure of the Court to charge the jury that it may disregard the in-court identification, if found to be tainted by suggestive identification procedures, was error. United States v. Wade, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), Simmons v. United States, supra.

The highly suggestive identification procedures, the in-court identification suggested thereby, coupled with the failure of the witness to positively identify Appellant, and the inadequate instruction to the jury concerning the identification, spell a substantial violation of the constitutional rights of Appellant and call for a reversal of his conviction.

POINT VII

THE COURT SHOULD HAVE DIRECTED THE GOVERNMENT TO TURN OVER ANY REPORTS CONCERNING A TYPEWRITER IN HOROWITZ' POSSESSION.

At the close of the case but before closing arguments, defense counsel requested that the Government turn over any reports which would indicate that documents in evidence were typed on Israel Horowitz' typewriter in Astoria, Queens (320a) (372a-374a).

Horowitz had taken the Fifth Amendment in part when testifying at trial. The defense had learned that the Government had examined Horowitz' typewriter and believed that the reports would buttress and confirm the defense that Horowitz had been the perpetrator of the scheme. If, in fact, the reports existed, they would constitute exculpatory or Brady material and be significant to defense position. The Court summarily denied the application without even asking the Government to confirm or refute the defense allegation (320a-322a, 372a-374a)

The within case should be reversed and remanded.

POINT VIII

A.

APPELLANT'S CONSTITUTIONAL RIGHT TO RETAIN COUNSEL OF HIS OWN CHOOSING SECURED BY THE SIXTH AMENDMENT WAS VIOLATED.

On the 17th day of December, 1974, three (3) weeks before trial, Michael Rosen, Esq. moved in writing, on behalf of Saxe, Bacon, Bolan and Manley, to withdraw as counsel for Appellant. (390a-392a). Appellant, a rabbi, stated to the Court that he had retained Roy Cohn, personally, as counsel, not Rosen nor any firm (12a). He elaborated that he and several rabbis retained Roy Cohn to represent him (13a, 32a, 39a). The Court failed to resolve the issue as to who was, in fact, retained, but advised Appellant, even though Appellant made no such request, that he was eligible for the assignment of counsel without fee, under the Criminal Justice Act (15a, 19a).

On the 23rd day of December, 1974, at another pre-trial conference, the Court ruled that Cohn was not retained by Appellant, based upon an affidavit allegedly filed by Cohn, but without conducting a hearing on the issue, with Roy Cohn present (24a-26a, 41a). That affidavit misled the Court since it failed to advise the Court that Roy Cohn signed and filed the Omnibus Disclosure Motion in the instant case.

At still another pre-trial conference on the 3rd day of January, 1974, the Court put on the record that Michael Rosen had moved to withdraw as counsel, because of disagreements with Appellant and that Appellant had contended in his own affidavit that he had never hired Rosen, but Roy Cohn. The Court went on to state that "Mr. Cohn was invited to be present. . . ." (26a) Michael Rosen then interrupted:

> "Judge, I understand that Mr. Cohn was directed to be present, and I advised your law clerk of a personal situation which for many reasons I would not like to make part of the record here, although if. . . .There is absolutely no question that there is no attorney-client relationship anymore. He says it in his papers, and he is right." (26a)

The Court then put on the record that Appellant "submitted a number of affidavits from various rabbis who apparently involved in the retention of counsel for the defendant. In addition, the defendant has submitted a photocopy of a check made payable to Mr. Roy Cohn, presumably as partial payment for his service." (40a)

The Court did not give Appellant time to obtain other counsel of his choosing.

The Court did not call a hearing to resolve the issue, whether in fact, Appellant had retained Roy Cohn to represent him. Neither did the Court call a hearing to examine the six (6)

individuals who submitted affidavits to the Court in support of Appellant's contention that Appellant had retained Roy Cohn personally. Instead, the Court directed Michael Rosen to proceed with the defense of Appellant, over Appellant's objections and over Michael Rosen's objections.

It is respectfully submitted that the Court could just as well have directed Roy Cohn to proceed with Appellant's defense following a hearing to resolve the issue. Indeed, the evidence was overwhelming that Roy Cohn had, in fact, been retained. Appellant explained to the Court that he had retained Roy Cohn because of the reputation he enjoyed. Appellant had explained to the Court that he had been told that Michael Rosen would handle the pre-trial aspect of the case and that when it came to the trial, Cohn would step in (32a, 33a - 35a)

Appellant contends that the Court acted arbitrarily and capriciously in adamantly refusing to direct Roy Cohn to represent him at trial, or at the very least, conduct a hearing to examine all parties with respect to the question of retained counsel. Denial of Appellant's right to retain counsel of his own choosing requires the judgment of conviction to be reversed and a new trial ordered, without any showing of prejudice.

B.

THE DEPRIVATION OF THE RIGHT OF APPELLANT TO PARTICIPATE IN AND MANAGE HIS OWN DEFENSE WAS A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The Court compounded its violation of Appellant's constitutional right to retain counsel of his own choosing by depriving him of his right to participate in his own defense. (43a(i)-(vi)

At the opening of the suppression hearing, Appellant moved the Court to act as co-counsel with Michael Rosen, who, again, did not want to represent Appellant, just as Appellant did not want him. Appellant repeated his objection that the Court had not directed Roy Cohn to represent him, after he had paid Mr. Cohn his fee, and assured the Court of his awareness of the rule that only one person be permitted to examine and cross exanine. It should be pointed out that Appellant was admitted to the bar of the Southern District of New York and to the Second Circuit and was a practicing attorney for over thirteen years in New York State. He is a highly educated man, being a rabbi as well.

During the proceedings, there were numerous differences as to trial strategy: as to dismissal of the indictment under the six month rule, the Court Exhibit 4 items, desire to take the stand, defense handwriting experts, Appellant's wish to sum up, witnesses to be subpoenaed and polling of jurors.

This Court can take judicial notice of the fact that often, more than one counsel appears for a party, the procedure Appellant was seeking to invoke. There is no doubt that he was qualified to participate as he was admitted to the Southern District. It is interesting to note that the Court did offer to allow him to proceed pro se, but only if he would waive his right to counsel to assist him.(43a)

> "The right of an accused to defend himself, as we conceive it, rests on two bases. . .He must have the means of presenting his best defense, and to this end he must have complete confidence in his counsel. Without such confidence a defendant may be better off representing himself. Moreover, even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires. . . ." United States ex rel Maldonado v. Denno, 384 Fed. 2d 12 (2nd Cir. 1965).

> "The right to act pro se. . .is a right arising out of the Federal Constitution and not the mere product of legislation or judicial decision. Thus, we would be required to remand the case, even if no prejudice. . . were shown to have resulted from the refusal to permit him to act pro se . . . .Implicit is the right of the accused to manage and conduct his own defense in a criminal case." United States v. Plattner, 330 Fed. 2d 271 (2nd Cir. 1964).

See also Meeks v. Cravern, 482 Fed. 2d 465, People v. McIntyre, 36 N.Y. 2d 10.

During the pre-trial and trial proceedings, Appellant was always respectful to the Court, but on each occasion that he sought to participate in his defense, he was rebuffed by the Court:

> "Defendant Wolfish: I just want to say something.
> The Court: No. You can except.
> Defendant Wolfish: I except.
> The Court: Mr. Wolfish, I don't want to hear from you, please." (207a, 208a)

The United States Supreme Court heard argument on the pro se question in Faretta v. California, No. 73-5773 argued on November 19, 1974. No decision has been made as of the date of this brief.

Thirty-three (33) states constitutionally guarantee a defendant to be heard by himself and by counsel. The Sixth Amendment guarantees a defendant the "Assistance of counsel for his defense". Appellant sought no more than to be co-counsel and have assistance of retained counsel. The Court should not and cannot afford him less. In light of the foisting of "retained counsel" upon Appellant and denial of co-counsel status to Appellant, the proceedings should be nullified and Appellant entitled to a new trial.

POINT IX

A.

THIS COURT SHOULD EXAMINE SEALED COURT EXHIBIT 4 TO DETERMINE WHETHER SAME SHOULD HAVE BEEN SHOWN TO DEFENSE COUNSEL.

Coradino Ernest Catti, an American foreign service officer, testified on behalf of the Government as to events concerning his assignment at the Tel Aviv Consul. He brought with him to Court numerous documents corcerning the instant case. The Court reviewed the documents, refused to turn the items over as 3500 material, sealed them as a Court Exhibit and deposited them in the safe for examination by the Appellate Court(163a-166a), Appellant respectfully asks this Court to review the documents to determine their relevance as to the question of the Israeli search dealt with below, Brady material or 3500 material.

B.

THE SEIZURE OF FORGED DEATH CERTIFICATES AND OTHER DOCUMENTS FROM THE APARTMENT OF APPELLANT IN JERUSALEM UNDER COLOR OF A DEFECTIVE SEARCH WARRANT VIOLATED THE FOURTH AMENDMENT, SINCE THE ISRAELI POLICE WERE ACTING AS AMERICAN AGENTS.

The Israeli police searched an apartment in Jerusalem on the 9th day of August, 1972 wherein they seized forged death certificates and other documents, the basis for this prosecution.

The Israeli search was pursuant to a defective warrant which stated:

> "In the investigation department in the national headquarters in Jerusalem there is an investigation about a forgery of a death certificate and using it in order to collect insurance money; and I have reason to believe that Louis (father's name: Izidor) Wolfish, Jerusalem, 4 Mevo Timnah Street has documents connected with the above case, that are necessary for the investigation. Therefore, I hereby command the Israeli Police to search in the above mentioned place in order to find the suspected items." (387a, 388a)

Subsequently, a competent Israeli Court declared the said search and seizure and subsequent transfer of documents by Israel to the United States as illegal (389a).

At the suppression hearing, John Slavinski, a postal inspector, testified that he was assigned to the case and tried to locate Appellant to serve him with a subpoena (44a, 45a). He contacted Mr. Gatti of the American Embassy in Israel, to solicit Israeli cooperation (47a, 48a, sealed court exhibits 4)

He testified to the extent that he solicited and received Israeli cooperation in the case (49a, 50a, 51a, court exhibits 4)

Appellant was brought to the Israeli Police Headquarters on July 27, 1972 by the Israeli Police for interrogation, at the request of the Americans. Present at the questioning were two (2) American Consular officials (52a) (-54a).* The search occurred two (2)

*The consuls were present at the behest of the United States Attorney's office of the Southern District of New York and a Court Order to serve subpoena.

weeks later.

Footnote 10 in the opinion of Birdsell v. United States, 346 Fed. 2d 775 (5th Cir. 1965) recognizes that not all searches abroad can avoid Fourth Amendment surveillance:

> "We do not mean to say that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might not refuse to allow the prosecution to enjoy the fruits of such action."

In Brulay v. United States, 383 Fed.2d 345 (10th Cir. 1967), a search was upheld without applying Fourth Amendment standards. The Court stated: "No United States officer participated in the questioning at or prior to the time of seizure." In the instant case, American consular officials did participate in questioning and requested the investigation. See also United States v. Welch, 455 Fed. 2d 211 (2nd Cir. 1972).

On the same day as the search, the police informed the American Embassy of the fruits of the search and made the documents recovered available to the Americans, an act which a subsequent Israeli court termed "illegal".

Although Major Aharon Halpern testified that it was his idea to make the search (60a), he admitted that he did so only after he was contacted by Mr. Mallon, the American Vice-Consul (56a). During trial, Mr. Halpern clearly testified that he was acting at the behest of the American authorities:

> "Sometime in the beginning of May of 1972, I was instructed by my superiors to find out some details about a death certificate in the name of Louis Wolfish. . .We were asked to find out all those things on the request of the postal inspector, the United States Post Office." (195a, 196a).

Undoubtedly, the Israelis were acting as agents for their principal, the American Government. The Israelis had reason to believe a crime had been committed by Appellant in the United States. Their mission on August 9, 1972, the day of the search, was to obtain evidence for the officials of a friendly nation.

In United States v. Toscanino, 500 Fed. 2d 267 (2nd Cir. 1974), Uruguayan police acted as agents of their American counterpart. The Court sustained a writ of habeus corpus directing defendant's return to Argentina.

Judgment of conviction should be reversed. The evidence seized by the Israelis, acting for the American prosecutorial team, was come by in violation of basic Fourth Amendment tenets. The Court is again respectfully referred to Court Exhibit 4.

POINT X

THE COURT ACTED ARBITRARILY IN NOT PERMITTING THE DEFENDANT TO COMPLETE THE SUPPRESSION HEARING

After the testimony of Major Halpern, the defense wished to call someone from the State Department and Commander Roth (60a(i)-60a(iii)) to show the involvement of the American State Department. The Court denied the inquiry. Defendant was denied due process by not being permitted to present a full hearing (60a(iii)) (sealed Court Exhibits 4, 52a-56a).

POINT XI

THE DISTRICT COURT ERRED IN NOT DISMISSING THE INDICTMENT BASED UPON AN INSUFFICIENCY OF THE EVIDENCE UNDER 18 U.S.C. 1341

It is clearly an essential element of the crime charged under 18 U.S.C. 1341, that the defendant had knowledge that his act would cause the mails to be used in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended. United States v. Maze, 414 U. S. 395. (6a-8a, 379a-381a)

The question is whether there was sufficient evidence in this case for the jury to find the requisite knowledge beyond a reasonable doubt. United States v. Tavoularis, et al, Docket nos. 75-1027, 75-1028, 75-1032, (2nd Cir.), decided May 6, 1975.

In the case at bar a perusal of the entire record will show that no evidence, direct or indirect, was adduced before the jury showing that the defendant himself used or with knowledge caused others to use the mails as part of the alleged fraudulent scheme charged in order to enable the jury to make their findings beyond a reasonable doubt under 18 U.S.C. 1341. (311a(i)-315a)(316a(i)-(ii))

> "Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonalbe doubt that

he committed the particular crime with which he is charged. United States v. Tavoulavis, Supra.

The Judgements of conviction should be reversed and the case remanded to the district court with instructions to dismiss the indictment.

CONCLUSION

For the reasons stated the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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